IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL APPEAL NO. 50 OF 2005

Rakesh Cashew Industry,
represented by its Proprietor
Shri Rakesh Fulari, Opp.
Government College, Gokul Wadi,
Sankhali, Goa. 403 505. ..... Appellant/Complainant

V e r s u s

Shri Damodar K. Ghadi,
House No. 827,
Ghadiwada, Virdi, Sanquelim,
Goa. 403 505.
(Above are the Regd. Addresses). ..... Respondent/Accused

Mr. S. G. Bhobe, Advocate for the Appellant.

Mr. Shivan Dessai, Advocate for the Respondent.

CORAM: N. A. BRITTO, J.

DATE: 30th March, 2007.

ORAL JUDGMENT

This is a Complainant's appeal against the acquittal of the accused under Section 138 of the Negotiable Instruments Act, 1881, (Act, for short), by Order dated 11.04.2005 of the learned J.M.F.C., Bicholim.

2. The case of the Complainant, in brief, was that the Complainant was having a business in the name of M/s. Rakesh Cashew Industry, situated at Gokulwadi, Sankhali, Goa, and that somewhere in the month of April 2003, the accused had purchased from the Complainant, cashew nuts of different

varieties worth Rs.83,500/- and the accused had paid Rs. 3,500/- in cash at the time of taking delivery of the said cashew nuts and had issued a cheque for the balance amount of Rs.80,000/- bearing no. 023612 dated 10.05.2003, which the Complainant presented in his account in Lokmanya Co-operative Credit Society Ltd., Sankhali branch, for encashment somewhere in October 2003 but the said cheque was returned with a memorandum of Vividha Urban Co-operative Credit Society, Sankhali, dated 17.10.2003, stating that the payment was stopped by drawer.

3. The Complainant after receiving the intimation from the said Lokmanya Co-operative Credit Society Ltd, dated 23.10.2003, sent a statutory notice on 29.10.2003, calling upon the accused to make the payment of Rs.80,000/- within 15 days, which the accused received on 01.11.2003 and the accused replied vide reply dated 15.11.2003, stating that the accused did not have any transaction with the Complainant. The accused also stated that he had obtained a cheque book from the said Vividha Urban Co-operative Credit Society Ltd.,Sankhali, on 14.01.2003, which he had lost and, accordingly, had lodged a complaint to the said Society.

4. In support of the complaint, the Complainant examined himself and the Branch Manager of Lokmanya Co-operative Credit Society Ltd., Sankhali. The case of the accused, in his statement recorded under Section 313 of the Code, (Code of Criminal Procedure, 1973), was that his cheque book was lost

and he had not issued the cheque to the Complainant. The accused further stated that he had given a letter to the Bank stating that his cheque book was lost. The accused examined himself and produced an intimation dated 14.01.2003, given by him to his said Bank Vividha Urban Co-operative Credit Society Ltd., intimating that he had lost the cheque book containing ten cheques and further stating that he had not issued any cheque to anyone from the said book. The accused produced another letter dated 30.06.2003, addressed to his said Bank stating that because of their negligence, they had intimated that the cheque was dishonoured because funds were insufficient. The accused also produced another letter dated 16.11.2003, issued by his said Bank, clarifying that the correct position why the cheque was dishonoured was that the payment was stopped by the drawer and not that the funds were insufficient. The accused also examined himself, the Branch Manager of Vividha Urban Co-operative Credit Society Ltd., Sankhali, and another Clerk from the same Society, to confirm the intimation dated 14.01.2003, by the accused as regards the loss of the cheque book.

5. The learned Magistrate held that the cheque was presented by the Complainant within its validity period but since the cheque was presented in October, 2003, it raised a doubt as regards the credibility of the case of the Complainant. According to the learned Magistrate, the presumption available to the Complainant under Section 139 of the Act, was rebutted by the accused, and, the learned Magistrate accepted the plea of the accused that the cheque

book was lost since the evidence of the Complainant was far from satisfactory, considering the facts and circumstances of the case.

6. On behalf of the Complainant, learned Counsel Shri Bhobe submits that it is very difficult to believe that in case the cheque book was lost by the accused, of all the persons, the cheque book was found by a person who had sold cashew nuts to the accused. Learned Counsel further submits that the admissions by the accused coupled with the statements of Mukund Naik/Dw2, show that the Complainant had prosecuted the accused in respect of another cheque and which case was withdrawn by the Complainant after the accused made the payment and in such a situation also, it is difficult to accept that the cheque book was lost by the accused. Learned Counsel further submits that the accused had not disputed his signature as well as the other details filled in on the said cheque and it is difficult to accept that the accused would sign or write the details the moment he had collected the cheque book from the Bank.

On the other hand, Shri Dessai, the learned Counsel on behalf of the accused submits that the case of the Complainant stood falsified, that the cheque was issued towards a legally enforceable debt, upon the failure of the Complainant to produce any receipt towards the supply of cashew nuts or for that matter, not having recorded the name of the accused on the list of sundry debtors, which list the Complainant admitted was being maintained by him. In this context, it may be stated that the Complainant had admitted in his cross

examination of having issued a receipt, duly acknowledged by the accused, and when he was required to produce the same on the next occasion, the Complainant brought the said receipt but, it was found that there was no acknowledgment of the accused on the said receipt and, therefore, the said receipt was not taken on record by the Court. Learned Counsel further submits that the settlement of the other case filed by the Complainant, has no bearing on the facts of this case. Learned Counsel further submits that the accused had taken two alternative defences, the first is that there was no legally enforceable debt due to the Complainant and the second that the accused had lost the cheque book. Learned Counsel has placed reliance on the case of ***Girish Kantappa Shetty v. State of Maharashtra (2004 ALL MR (Cri) 1721), P. Narsimha Reddy v. D. L,. Narasimha Rao & anr. (2004 ALL MR (Cri) Journal 98)*** and ***Nagisetty Nagaiah v. State of A.P. & anr. (2004 Cri. L. J. 4107)***.

7. This Court, in case of ***Girish Kantappa Shetty v. State of Maharashtra*** (supra), after referring to several Judgments of the Apex Court including ***Hiten P. Dalal v. Bratindranath Banerjee*** and ***K. N. Beena v. Muniyappan & Ors.,*** concluded that in a complaint under Section 138 of the Act, the Court has to presume that the cheque had been issued for discharge of a debt or liability and that this presumption is rebuttable. However, the burden of proving that the cheque has not been issued in discharge of a debt or liability is on the accused. This Court referred to the case of ***K. Bhaskaran v.***

Sankaran Vaidhyan Balan & anr. (1999 (4) ALL MR 452), wherein the Supreme Court in Para 9 had observed thus:

> "As the signature in the cheque is admitted to be that of the accused, the presumption envisaged in Section 118 of the Act can legally be inferred that the cheque was made or drawn for consideration on the date which the cheque bears. Section 139 of the Act enjoins on the Court to presume that the holder of the cheque received it for the discharge of any debt or liability. The burden was on the accused to rebut the aforesaid."

It is now well settled that the rebuttal by the accused of the presumptions available in favour of the Complainant does not have to be conclusively established but such evidence must be adduced before the Court in support of the defence that the Court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the prudent man.

8. Reverting to the facts of the case, in my view, the plea of the accused that he had lost the cheque book on the same day he had obtained it from his Bank, is a plea which sounds highly improbable. The cheque in question was deposited within its validity period. The learned Magistrate was not justified in doubting the case of the Complainant merely because the

cheque was not immediately deposited for collection, even without asking for an explanation from the Complainant as to why he had taken sometime to deposit the same.

9. According to the accused, when he reached home, he found that the cheque book was lost which was in the bag. As rightly pointed out on behalf of the Complainant, nobody signs a cheque book the moment it is issued in the Bank, even before reaching one's home. There is no dispute that the subject cheque was signed by the accused. The accused also did not raise a dispute that the other details of the cheque as regards the name of the payee or the amount payable or the date were filled in by the Complainant. In fact, there has been no cross examination whatsoever on those aspects done on behalf of the accused. In such a situation, when the Complainant stated that the accused had given him a cheque dated 10.05.2003, it is safe to presume that the cheque was filled in and signed by the accused in all respects. Therefore, the plea that the cheque book was lost by the accused on his way home, could not be accepted, notwithstanding the letter dated 14.01.2003, addressed by the accused to his Bank and the evidence of Dessai/Dw3, to support the same. Moreover, the evidence of Mukund Naik/Dw2, the Branch Manager of the Bank of the Accused, shows that only two cheques had come to the Bank for collection and both the cheques were not honoured. He also stated that they had not received any letter similar to letter dated 30.06.2003, (Exhibit Dw1/B) as regards the second cheque. In his cross examination, the accused/Dw1,

admitted that there was another criminal complaint filed by the Complainant against him in 'C' Court at Bicholim and in that case also, he had produced the letter dated 14.01.2003 (Exhibit Dw1/A), 30.06.2003 (Exhibit Dw1/B) and letter dated 16.07.2003 (Exhibit Dw1/C). The accused admitted that the said complaint was withdrawn by the Complainant in view of the payment made by him to the Complainant. It did not require a discerning eye to conclude that the said complaint which was withdrawn by the Complainant on payment being made by the accused pertained to the second cheque which was dishonoured, as stated by Mukund Naik/Dw2. From the admissions of the accused and the evidence of Naik/Dw2, it is clear that out of the cheque book of ten cheques collected by the accused from his Bank, two cheques were issued by the accused to the Complainant, one of which, is the subject matter of this complaint from which this appeal arises and the other of the complaint which was withdrawn by the Complainant, after the Complainant was paid by the accused the amount of the dishonoured cheque. This part of the evidence further falsifies the plea of the accused that the accused had lost the cheque book of ten cheques after he had collected the same from his Bank on 14.01.2003. It is, therefore, obvious that the letters dated 14.01.2003 (Exhibit Dw1/A), 30.06.2003 (Exhibit Dw1/B) and 16.07.2003 (Exhibit Dw1/C), were manipulated by the accused with his Bank with a view to avoid his liability towards the dishonoured subject cheque issued by the accused to the Complainant.

10. As regards the submission that there was no legally enforceable debt, in my view, the case of ***Girish Kantappa Shetty v. State of Maharashtra*** (supra), on which strong reliance has been placed on behalf of the accused, does not help the case of the accused at all. That case stood on its own facts. In that case, the Court was considering whether the accused had the capacity to advance a loan of Rs.3,00,000/- in cash towards which it was claimed that the cheque was issued in a situation where the Complainant had no income of his own and he was working as a articled Clerk in a firm of a C.A. That was also a case where the accused in reply to the statutory notice had alleged that the cheques were stolen from his office and the Complainant had failed to rejoin in replying to the said reply given by the accused and an adverse inference was drawn against the Complainant. In the case at hand, the Complainant has categorically stated that he has a business of processing and selling cashew nuts. The name of his business is mentioned in the very cause title of the complaint. The Complainant has again categorically stated that the accused had paid him a sum of Rs.3,500/- and for the balance amount of Rs.80,000/-, the accused had issued a cheque to the Complainant. Except for vaguely stating that there was no legally enforceable debt, it was not even suggested to the Complainant on behalf of the accused that the Complainant had not supplied any cashew nuts to the accused or for that matter had not paid the cash amount of Rs.3,500/- towards part payment of supply of cashew nuts of different varieties worth Rs.83,500/-. It is true that the Complainant stated initially that he was having a receipt duly acknowledged by the accused but was

unable to produce such a receipt and a receipt without acknowledgment was not accepted by the Court. The Complainant also admitted that he was maintaining a list of sundry creditors and sundry debtors but he had not included the name of the accused in the said list of sundry debtors. Considering the facts of the case, in my view, the absence on the part of the Complainant to include the name of the accused on the list of sundry debtors maintained by him or upon his failure to produce a receipt for the supply of cashew nuts to the accused duly acknowledged by the accused, was not at all sufficient to rebutt the presumptions which were available to the Complainant in terms of Sections 118 as well as Section 139 of the Act. Considering the totality of the facts of the case, in my view, the accused has failed to rebutt the presumptions available in favour of the Complainant. The learned Magistrate, therefore, ought to have convicted the accused.

11. Consequently, the appeal deserves to succeed. The Judgment/Order of the learned Magistrate dated 11.04.2005, is hereby set aside and the accused is hereby convicted under Section 138 of the Act.

12. On point of sentence, learned Counsel on behalf of the Complainant submits that minimum imprisonment of atleast three months be imposed on the accused. On the other hand, Shri Dessai, the learned Counsel on behalf of the accused submits that the accused is a first offender and, therefore, no substantive sentence be imposed on the accused. Punishment

must be proportionate to the crime committed and must be imposed also by keeping in mind the objects sought to be achieved by the Act. The Act was enacted with a view to encourage the culture of cheques and enhancing the credibility of the instrument as the existing provisions were found to be deficient. The punishment provided was enhanced from one year to two years from 06.02.2003. In my view, considering the facts and circumstances of this case, ends of justice would be met, by sentencing the accused under Section 138 of the Act to undergo SI of fifteen days. The accused is also directed to pay to the Complainant a sum of Rs.1,05,000/- by way of compensation and in default to undergo six months S.I. The bail bonds of the accused shall stand cancelled.

13. At the request of Shri Dessai, the sentence imposed upon the accused is suspended for a period of four weeks to enable the accused to approach the Hon'ble Supreme Court.

N. A. BRITTO, J.

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